

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

*RICHY CASTRO, et al., on behalf of themselves
and all individuals similarly situated,*

Plaintiffs,

v.

Civil Action No. 1:19-cv-1008

*CAPITAL ONE FINANCIAL CORPORATION,
et al.,*

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE

Plaintiffs, by counsel, and pursuant to Fed. R. Civ. P. 42(a), move the Court¹ for the entry of an order consolidating the Capital One data breach cases—either in the Richmond Division or alternately here—for the purposes of scheduling a status conference in order to reconcile filing dates in the cases, minimize duplication by the various Plaintiffs' groups, the Defendants, and the Court, and to set a process for consideration of the appointment of interim coordinating class counsel. In support of their motion, Plaintiffs respectfully submit the following memorandum of law.

BACKGROUND

Plaintiffs filed this lawsuit in the Alexandria Division of this Court, the venue of Defendants' headquarters.² Capital One's inadequate security protections allowed the data breach

¹ Plaintiffs file this Motion within this Docket as they are counsel only in this Action. But the earliest filed Capital One case in this Division is actually *Baird v. Capital One Financial Corporation*, 1:19-cv-00979-LMB-JFA, which is also before Judge Brinkema.

² Despite the label, Capital One's principal place of business is in the Richmond Division, where the majority of its employees are located—there are 11,400 Capital One employees in the Richmond Division, versus 7,000 NOVA employees. Carol Hazard, *Capital One empowers*

and theft of personal identifying information (“PII”) belonging to over 100 million United States consumers, including the Plaintiffs. This PII was then irreversibly posted on various Internet and social media websites for the public to see. Upon this near-record setting data breach, Plaintiffs have alleged a national class complaint, including counts for negligence, negligence *per se*, breach of implied contract, unjust enrichment, and a request for declaratory judgment. The proposed classes in this case encompass all persons residing in the United States whose personal identifying information was disclosed in the data breach.³

In addition to this case, numerous other cases have been filed in this District involving the same data breach, including at least nine others in this Division.⁴ Three cases are pending in Richmond, two (and the first filed) before Judge Gibney. They all rely on the same factual grounds and involve the same or similar causes of action against the Defendants.

Absent the Court’s immediate intervention, the Capital One cases will become chaotic. All of the cases—other than those brought by the undersigned counsel team—are controlled and prosecuted by counsel with modest or no experience in this District. The cases were filed over the

employees to dream, disrupt and find solutions, Richmond Times – Dispatch, May 2, 2019, (Aug. 12, 2019 at 3:55 PM) at https://www.richmond.com/business/local/top-workplaces/capital-one-empowers-employees-to-dream-disrupt-and-find-solutions/article_f0595b25-10b0-5ae8-a70f-b699daa5ecff.html. Jennifer E. Goldman, *Capital One’s new headquarters means big things for Northern Virginia*, InsideNOVA, Oct. 22, 2018, (Aug. 12, 2019 at 3:58 PM) at https://www.insidenova.com/news/business/capital-one-s-new-headquarters-means-big-things-for-northern/article_b4009e1a-d654-11e8-9c75-e7ccc4df3735.html. Further, Capital One’s Chief Security Officer and Chief Information Officers are both located in Richmond. (Aug. 12, 2019, 1:53 PM), <https://www.linkedin.com/in/william-baker-9ba8b35/>; (Aug. 12, 2019, 1:55 PM), <https://www.linkedin.com/in/robert-alexander-3777a04/>.

³ The Plaintiffs have also alleged two subclasses—one for individuals who applied for Capital One credit products during a certain time period whose applications were denied or who did not receive the card, and the other for people about whom Capital One’s records show that a credit card application was received, but who did not actually apply for the credit card.

⁴ As of the date of this filing, thirteen cases have been filed in this District. Exhibit A.

range of at least a week, with service attempted and completed on different dates. And Capital One of course may fairly elect to answer some matters more quickly than others for strategic purposes. Even beyond these timing concerns, it is likely that the Court will receive and be required to resolve largely duplicative pleadings from Capital One in every case.

There is no need for this convoluted process. Given the similarity and overlap of the Capital One cases, Plaintiffs respectfully submit the Court should consolidate all of the cases on an interim basis and set an immediate status conference, before Defendants are required to respond to any action in order to determine the positions (or arguments) of each party regarding full consolidation. Plaintiffs ask that the Court allow interim consolidation of these cases in *Heath v. Capital One Financial Corp.*, 3:19-cv-555. The Court could then hold a status conference regarding all of the Capital One Data Breach filings in the District.⁵ The Court could then reconcile filing dates in the cases, schedule deadlines and processes to minimize duplication by the various Plaintiffs' groups, the Defendants, and the Court. And the Court should set a process for consideration of the appointment of Coordinating Counsel for the cases pending in this District, if not also interim class counsel.⁶ This would streamline all of the cases and preserve the resources of both the Parties and this Court. Given the number of cases that have already been filed, with

⁵ Plaintiffs' counsel have also filed a comparable motion before Judge Gibney and are asking for the Court's consent to consolidate the Alexandria cases in the Richmond Divisions on the same limited interim basis.

⁶ As is maybe too typical, when stories like this data breach hit, there is a race to file by lawyers around the country. Some like the present group litigate in the consumer protection and financial services fields. Others do not.

likely more to follow, setting these cases on a similar litigation track would ensure that each of the cases remain focused on an orderly consideration of the claims at issue in these cases.⁷

ARGUMENT

Fed. R. Civ. P. 42(a)(2) provides that a court may order consolidation of cases where they involve a common question of law or fact. In addition to outright consolidation, it is within the Court's discretion to issue any other order to avoid unnecessary cost or delay. Fed. R. Civ. P. 42(a)(3). The Court has "broad discretion" with regard to cases pending in the same District and should make this determination while weighing the efficiencies created by consolidation against any inconvenience, delay, or expense that might result. *A/S J. Ludwig Mowinckles Rederi v. Tidewater Construction Co.*, 559 F.2d 928, 933 (4th Cir. 1977); *Stein, Hall & Co. v. Scindia Steam Navigation Co.*, 264 F. Supp. 499, 501 (S.D.N.Y. 1967); *see generally*, Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 2383 at 439. Specifically, when considering a motion to consolidate, the Court should weigh the risk of inconsistent adjudications of common factual and legal issues, the burden on the parties, witnesses and judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single trial versus multiple-trial alternatives against the specific risks of prejudice and possible confusion which might result from consolidation. *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982).

Here, all of the equities weigh in favor of interim consolidation. All of the cases revolve around the same overarching facts—the Defendants' lax security protocols and negligence that led

⁷ While various motions are now pending before the Panel for Multidistrict Litigation for hearing September 26, 2019, it is difficult to see how the cases do not ultimately end up before the Eastern District of Virginia. Regardless, substantial litigation will necessarily occur before the Panel can make that decision.

to the data breach, which resulted in the Plaintiffs' and putative class members personal identifying information being accessed by a third party and subsequently published on the internet. Holding the requested status conference will set these cases on a track which can be efficiently litigated and resolved. Plaintiffs' counsel is not only committed to reducing the burden and cost of litigating the cases, but also to coordinate and work fairly with all plaintiffs' counsel in presenting these issues before the Court in the requested status conference.

Common scheduling and/or interim consolidation of the cases also aids in preserving judicial resources and is therefore in the interests of justice. A significant factor in considering the interests of justice is "avoiding duplicative litigation in courts," and the Court "may appropriately consider the 'conservation of judicial resources and comprehensive disposition of litigation.'" *Cronos Containers, Ltd. v. Amazon Lines, Ltd.*, 121 F. Supp. 2d 461, 466 (D. Md. 2000). Here, the Court will be able to set the cases on the same schedule, and deal with any discovery disputes or other issues at the same time, rather than hearing duplicative motions in each case, thus reducing docket congestion, increasing judicial efficiency, and ultimately reducing the amount of time that it takes to litigate these cases.

Plaintiffs are in the process of reaching out to counsel representing Plaintiffs in all cases pending in the Alexandria Division and will file supplemental notice of any positions then received. Plaintiffs for all three cases pending in Richmond support this motion. Plaintiffs are also attempting to consult counsel representing the Defendants in these matters regarding this motion, and will file notice of such position when and if received.

CONCLUSION

For these reasons, and in furtherance of the interests of judicial economy and efficiency, Plaintiffs respectfully request that this Court consolidate this case either with all of the Capital One

Data Breach cases in the Richmond Division, or alternately all of the cases in this District for the limited purpose of setting a status conference as soon as the Court's schedule permits.

Respectfully submitted,
PLAINTIFFS

By: /s/ Kristi C. Kelly
Kristi C. Kelly, Esq., VSB #72791
Andrew J. Guzzo, Esq., VSB #82170
Casey S. Nash, Esq. VSB #84261
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
Telephone: (703) 424-7572
Facsimile: (703) 591-0167
Email: kkelly@kellyguzzo.com
Email: aguzzo@kellyguzzo.com
Email: casey@kellyguzzo.com

Leonard A. Bennett, Esq., VSB #37523
Craig C. Marchiando, Esq., VSB #89736
Elizabeth W. Hanes, Esq., VSB #75574
CONSUMER LITIGATION ASSOCIATES, P.C.
763 J. Clyde Morris Blvd., Ste. 1-A
Newport News, VA 23601
Telephone: (757) 930-3660
Facsimile: (757) 930-3662
Email: lenbennett@clalegal.com
Email: craig@clalegal.com
Email: elizabeth@clalegal.com

Matthew J. Erasquin, VSB No. 65434
Tara B. Keller, VSB No. 91986
CONSUMER LITIGATION ASSOCIATES, P.C.
1800 Diagonal Road, Suite 600
Alexandria, Virginia 22314
Tel: 703-273-7770
Fax: 888-892-3512
Email: matt@clalegal.com
Email: tara@clalegal.com

Charles B. Molster, III VSB 23613
LAW OFFICES OF CHARLES B. MOLSTER, III
PLLC
2141 Wisconsin Avenue, N.W., Suite M
Washington, D.C. 20007

Telephone: (703) 346-1505
Email: cmolster@molsterlaw.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August 2019, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system which will send a notification of such filing (NEF) to all counsel of record. I have also provided notice by email to:

David L. Balser
Phyllis B. Sumner
S. Stewart Haskins II
KING & SPAULDING, LLP
1180 Peachtree Street, NE
Suite 1600
Atlanta, GA 30309
dbalser@kslaw.com
psumner@kslaw.com
shaskins@kslaw.com

David H. Thompson (*pro hac vice forthcoming*)
Haley N. Proctor
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Email: dthompson@cooperkirk.com
Email: hproctor@cooperkirk.com

Joseph H. Meltzer (*pro hac vice forthcoming*)
Naumon A. Amjed (*pro hac vice forthcoming*)
Melissa L. Troutner (*pro hac vice forthcoming*)
KESSLER TOPAZ MELTZER & CHECK LLP
280 King of Prussia Road
Radnor, PA 19087
Email: jmeltzer@ktmc.com
Email: namjed@ktmc.com
Email: mtroutner@ktmc.com

Geoffrey R. McDonald
Justin M. Sheldon
Frank H. Hupfl
GEOFF McDONALD & ASSOCIATES, P.C.
3315 West Broad Street
Richmond, VA 23230
Tel: (804) 888-8888
Fax: (804) 359-5426
Email: GMcDonald@mcdonaldinjurylaw.com
Email: JSheldon@mcdonaldinjurylaw.com
Email: FHupfl@mcdonaldinjurylaw.com

W. Daniel “Dee” Miles, III (*pro hac vice forthcoming*)
Archie I. Grubb, II (*pro hac vice forthcoming*)
Leslie L. Pescia (*pro hac vice forthcoming*)
BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
218 Commerce Street
Montgomery, AL 36104
Email: Dee.Miles@BeasleyAllen.com
Email: Archie.Grubb@BeasleyAllen.com
Email: Leslie.Pescia@BeasleyAllen.com

John Cole Gayle, Jr.
THE CONSUMER LAW GROUP, P.C.
1508 Willow Lawn Dr., Suite 220
Richmond, VA 23230
Email: jgayle@theconsumerlawgroup.com

Jonathan Shub (*pro hac vice forthcoming*)
Kevin Laukaitis (*pro hac vice forthcoming*)
KOHN, SWIFT & GRAF, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
Email: jshub@koh Swift.com
Email: klaukaitis@koh Swift.com

James A. Francis (*pro hac vice forthcoming*)
John Soumilas (*pro hac vice forthcoming*)
FRANCIS & MAILMAN, P.C.
1600 Market Street, Suite 2510
Philadelphia, PA 19103
Email: jfrancis@consumerlawfirm.com
Email: jsoumilas@consumerlawfirm.com

John G. Harnishfeger
MURPHY, FALCON & MURPHY
One South Street, 23rd Floor
Baltimore, MD 21202
Email: john.harnishfeger@murphyfalcon.com

John A. Yanchunis (*pro hac vice forthcoming*)
Ryan J. McGee (*pro hac vice forthcoming*)
Patrick A. Barthle (*pro hac vice forthcoming*)
MORGAN & MORGAN
201 N. Franklin Street, 7th Floor
Tampa, FL 33602

Email: JYanchunis@ForThePeople.com

Email: RMcGee@ForThePeople.com

Email: PBarthle@ForThePeople.com

William H. Murphy III (*pro hac vice* to be submitted)

Jessica H. Meeder (*pro hac vice* to be submitted)

MURPHY, FALCON & MURPHY

One South Street, Ste 2300

Baltimore, Maryland 21202

Email: hassan.murphy@murphyfalcon.com

Email: jessica.meeder@murphyfalcon.com

Norman E. Siegel (*pro hac vice* to be submitted)

Barrett J. Vahle (*pro hac vice* to be submitted)

J. Austin Moore (*pro hac vice* to be submitted)

Jillian R. Dent (*pro hac vice* to be submitted)

STUEVE SIEGEL HANSON LLP

460 Nichols Road, Suite 200

Kansas City, MO 64112

Email: siegel@stuevesiegel.com

Email: vahle@stuevesiegel.com

Email: moore@stuevesiegel.com

Email: dent@stuevesiegel.com

Grant Morris

SANFORD HEISLER SHARP, LLP

700 Pennsylvania Avenue SE, Suite 300

Washington, DC 20003

Email: gmorris@sanfordheisler.com

Kevin Sharp (*pro hac vice* to be filed)

SANFORD HEISLER SHARP, LLP

611 Commerce Street, Suite 3100

Nashville, TN 37203

Email: ksharp@sanfordheisler.com

Adán Martínez (*pro hac vice* to be filed)

SANFORD HEISLER SHARP, LLP

1350 Avenue of the Americas, 31st Floor

New York, NY 10019

Email: amartinez@sanfordheisler.com

Ben Barnow (*pro hac vice* to be filed)

Erich P. Schork (*pro hac vice* to be filed)

Jeffrey D. Blake (*pro hac vice* to be filed)

BARNOW AND ASSOCIATES, P.C.

One North LaSalle Street, Suite 4600
Chicago, IL 60602
Email: b.barnow@barnowlaw.com
Email: e.schork@barnowlaw.com
Email: j.blake@barnowlaw.com

Timothy G. Blood (*pro hac vice* to be filed)
Thomas J. O'Reardon, II
BLOOD HURST & O'REARDON, LLP
701 B Street, Suite 1700
San Diego, CA
Email: tblood@bholaw.com
Email: toreardon@bholaw.com

Shpetim Ademi (*pro hac vice* to be filed)
Ben J. Slatky (*pro hac vice* to be filed)
ADEMI & O'REILLY, LLP
3620 East Layton Avenue
Cudahy, WI 53110
Email: sademi@ademilaw.com
Email: bslatky@ademilaw.com

Jodie E. Buchman
Pierce C. Murphy
SILVERMAN THOMPSON SLUTKIN & WHITE LLC
201 N. Charles Street, 26th Floor
Baltimore, Maryland 21201
Email: jbuchman@mdattorney.com
Email: pmurphy@mdattorney.com

Stuart A. Davidson (*Pro Hac Vice* Pending)
Christopher C. Gold (*Pro Hac Vice* Pending)
Dorothy P. Antullis (*Pro Hac Vice* Pending)
ROBBINS GELLER RUDMAN & DOWD, LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Email: sdavidson@rgrdlaw.com
Email: cgold@rgrdlaw.com
Email: dantullis@rgrdlaw.com

Mark S. Reich (*Pro Hac Vice* Pending)
58 South Service Road, Suite 200
Melville, NY 11747
Email: mreich@rgrdlaw.com

Daniel C. Cohen (*Pro Hac Vice* Pending)

Edward Y. Kroub (*Pro Hac Vice* Pending)
300 Cadman Plaza W, 12th Floor
Brooklyn, NY 11201
Email: dan@ccml.legal
Email: edward@cml.legal

Michael A. Yoder
Michael W. Slocumb (*Pro Hac Vice* Pending)
SLOCUMB LAW FIRM, LLC
777 6TH Street NW, Suite 520
Washington, DC 20001
Email: myoder@slocumblaw.com
Email: mike@slocumblaw.com

Scott A. Powell (*Pro Hac Vice* Pending)
HARE, WYNN, NEWELL & NEWTON, LLP
2025 Third Avenue North, 8th Floor
Birmingham, AL 35203
Email: scott@hwnn.com

Steven T. Webster
WEBSTER BOOK, LLP
300 N. Washington St, Suite 404
Alexandria, VA 22314
Email: swebster@websterbook.com

W. Lewis Garrison, Jr.
Taylor C. Bartlett
Christopher B. Hood
HENNIGER GARRISON DAVIS, LLC
2224 1st Avenue North
Birmingham, AL 35203
Email: lewis@hgdlawfirm.com
Email: taylor@hgdlawfirm.com
Email: chood@hgdlawfirm.com

James F. McDonough, III
Jonathan R. Miller
Travis E. Lynch
3612 Vinings Slope, Suite 4320
Atlanta, GA 30339
Email: jmcdonough@hgdlawfirm.com
Email: jmiller@hgdlawfirm.com
Email: tlynch@hgdlawfirm.com

Pierce Christopher Murphy

Jodie Elizabeth Buchman
Silverman Thompson Slutkin White, LLC
201 N. Charles St, 26th Floor
Baltimore, MD 21201
Email: pmurphy@mdattorney.com
Email: jbuchman@mdattorney.com

Dale Wood Pittman
The Law Office of Dale W. Pittman, P.C.
112-A W Tabb Street
Petersburg, VA 23803-3212
Email: dale@pittmanlawoffice.com

Scott A. Surovell
Surovell Isaacs & Levy, PLC
4010 University Dr, Suite 200
Fairfax, VA 22030
Email: ssurovell@surovellfirm.com

Ivy T. Ngo
Joshua E. Moyer
FRANKLIN D. AZAR & ASSOCIATES, P.C.
14426 E. Evans Avenue
Aurora, CO 80014
Email: ngoi@fdazar.com
Email: moyerj@fdazar.com

Mark A. Ozzello
Terek H. Zohdy
Cody R. Padgett
Trisha K. Monesi
CAPSTONE LAW APC
1875 Century Park East, Suite 1000
Los Angeles, CA 90067
Email: Mark.Ozzello@capstonelawyers.com
Email: Tarek.Zohdy@capstonelawyers.com
Email: Cody.Padgett@capstonelawyers.com
Email: Tricia.Monesi@capstonelawyers.com

Karen H. Riebel
Kate M. Baxter-Kauf
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401-2159
Email: khriebel@locklaw.com
Email: kmbaxter-kauf@locklaw.com

/s/

Kristi C. Kelly, Esq., VSB #72791
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
Telephone: (703) 424-7572
Facsimile: (703) 591-0167
Email: kkelly@kellyguzzo.com
Counsel for Plaintiffs